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In the Supreme Court of the United States

OCTOBER TERM, 1923

HUBERT WORK, SECRETARY OF THE INTERIOR, Appellant,
v.
STATE OF LOUISIANA
No. 289

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT

By a bill filed in the Supreme Court of the District of Columbia, the State of Louisiana sought an injunction restraining the Secretary of the Interior from enforcing an order or ruling directing a hearing to determine the mineral character of lands claimed by the State to be swamp or overflowed and inuring to it under certain acts of Congress. A mandatory injunction was also sought, commanding the Secretary to vacate this order or ruling and to recognize and give full legal force and effect to the State's rights under those acts. (R. 1–5.)

THE FACTS

The claim of the State is asserted under two statutes. The first is the Act of March 2, 1849, c. 87, 9 Stat. 352, section 1 of which reads:

> That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to that State.

Section 2 provided that upon being advised by the Governor that the State had made the necessary preparation to defray the expenses thereof, the Secretary of the Treasury (now Interior) should cause a personal examination to be made, under the direction of the surveyor general, by experienced and faithful deputies, of all the swamp lands which are subject to overflow and unfit for cultivation; and a list of the same to be made out and certified by the deputies and surveyor general, to the Secretary, who "shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana."

The other act under which claim is asserted is that of September 28, 1850, c. 84, 9 Stat. 519. It made a similar grant to the State of Arkansas and by section 4 extended its provisions and benefits to each of the other States of the Union in which such swamp and overflowed lands might be situated.

Section 2 of this act made it the duty of the Secretary of the Interior, as soon as practicable, to make out an accurate list and plats of the lands and transmit the same to the Governor, and at his request, cause a patent to be issued to the State and "on that patent, the fee simple to said lands shall vest in the said State * * *."

The lands involved in the suit are in Township 18 North, Range 12 West. They were shown on the plat of survey of 1838 as Cross Bayou, and Cross and Soda Lakes returned as navigable lakes, but by the field notes of a survey made in 1871 they are shown as swamp and overflowed lands. The public lands in this township were on December 15, 1908, withdrawn from settlement, entry, or other forms of appropriation, in aid of proposed legislation, and on July 2, 1910, by executive order, included in petroleum reserve No. 4.

The history of the adjudications of the claims of the State to lands in this township, which it asserted were swamp and overflowed, is detailed in the letter of the Commissioner of the General Land Office, dated November 13, 1919, which is Exhibit "A" to the bill of complaint. (R. 5–25.) It shows that the first claim of the State was predicated upon the survey of 1838, but after the survey of 1871 that survey was relied upon in future selections or listings.

Various adjudications were made at different dates as set forth in the Commissioner's letter resulting in partial approval and partial rejection of the several selections or listings. The *particular*

lands involved in this suit (with the exception of certain tracts in section 23) were presented for consideration by a communication dated April 24, 1901, to the Surveyor-General for Louisiana, from the Register of the State Land Office, wherein he requested that these tracts be listed and approved to the State as swamp lands. After intermediate proceedings, the Surveyor-General, in accordance with instructions of the Commissioner of the General Land Office, made up a revised list. (R. 18.) This was passed upon by the Commissioner as set forth at R. 19–24. It was found that several of the tracts had already been adjudicated or otherwise disposed of, and that as to the balance nearly all were embraced in homestead applications or entries allowed during the period 1915 to 1919.

In his letter of November 13, 1919, the Commissioner, after a full review of all the proceedings had on the claims of the State to lands in this township, found as follows (R. 24):

> It is found from the field notes of the survey of 1871 that the lands hereinafter described [the lands involved in this suit] are swamp or overflowed, and, if nonmineral in character, inure to the State under its grant, and may be patented pursuant thereto when the record has been cleared of adverse claims.

In view of the withdrawal of these lands as petroleum, the Commissioner then ordered the Register and Receiver at Baton Rouge to advise the Register of the State Land Office that thirty days

would be allowed within which a hearing might be applied for wherein "it may be shown that these lands are nonoil and nongas in character." (R. 25.) It was stated that in default of action by the State within the time limited, its swamp-land claim to these tracts would be rejected and the lands held and treated as subject to disposition under the applicable public land laws. (R. 25.)

Notice of the hearing was ordered to be given to the several homestead claimants and they were apprised that they might appear and participate in the hearing. (R. 25.)

From this order for such a hearing the State appealed to the Secretary of the Interior, who affirmed the order. His decision is set out as an appendix to this brief. A motion for the exercise of supervisory power was considered and denied (R. 26–27), whereupon the bill for injunction was filed.

The theory of the bill appears to be that the two acts making swamp-land grants were grants *in praesenti;* that mineral lands were not excepted from the grant of swamp lands, and that if so excepted the determination as to mineral character must relate to the date of the grant or the time of the approval of the plat of survey identifying the lands. (Par. IX, Bill of Complaint, R. 3.)

A motion to dismiss the bill was interposed by the Secretary of the Interior upon the grounds (1) that the suit was in substance one against the United States; (2) that there were other parties interested in the disposition of the lands who were indispensable

parties; (3) that the State had an adequate remedy at law after the United States had disposed of the lands; and (4) that the decision complained of was made by the Secretary in the exercise of judgment and discretion in a matter within his jurisdiction and hence not reviewable by the courts. (R. 28, 29.)

This motion was overruled (R. 29), and defendant electing to stand thereon a decree was entered awarding an injunction commanding the Secretary to vacate, recall, and annul so much of the decisions of the Land Department as operate to withhold title from the State for any reason dependent upon alleged mineral character or requiring a hearing on that question. The Secretary was further enjoined from making any disposition of the lands or from taking action affecting the same, save such immediate steps as are necessary to the final recognition of the State's rights under the Acts of March 2, 1849, and September 28, 1850, to the end that evidence of title may be given the State. (R. 30, 31.)

An appeal was prosecuted to the Court of Appeals of the District of Columbia, which affirmed the decree. (R. 37.) The opinion is on pp. 33-37 of the Record; 287 Fed. 999. A motion for rehearing was filed (R. 38–43) and denied (R. 44). The further appeal of the Secretary brings the case to this court.

ASSIGNMENT OF ERRORS

The assignment of errors (R. 45, 46) questions the correctness of the judgment of the Court of Appeals in the following particulars:

a. In reviewing the Secretary's construction of a statute which he was required to administer.

b. In holding and deciding that the United States was not a necessary party, and that the suit was not in effect a suit against it.

c. In failing to hold the homestead claimants to be indispensable parties to the suit.

d. In failing to hold that the Secretary of the Interior had jurisdiction to determine the character of the lands claimed by the State and in holding that the title to the lands had vested in the State with the approval of the 1871 survey.

e. In deciding that mineral lands are not excepted from the swamp-land grants.

Under these assignments we present the following propositions:

I. Mineral lands do not pass under the swamp-land grants but are excepted therefrom.

II. The Secretary of the Interior has jurisdiction to determine the character of the lands and the order for a hearing for that purpose being interlocutory in character, this suit is premature.

III. The suit is one against the United States.

IV. The homesteaders are indispensable parties.

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ARGUMENT

I

Mineral lands do not pass under the swamp-land grants but are excepted therefrom

The Court of Appeals very flatly held that the State of Louisiana is entitled to these lands regardless of their mineral character. It said (R. 36):

> No mineral reservation was made in the swamp-land grant of 1849 to Louisiana. This grant was made prior to the establishment by Congress of the policy of reserving the minerals generally in the grants of lands known to be mineral in character.

The decree of the Supreme Court of the District of Columbia proceeded upon the same theory.

In the light of the decision of this court in *United States* v. *Gratiot*, 14 Pet. 526, it is impossible to justify the view taken by the courts below. There it was said (p. 537):

> It has been the policy of the government, at all times, in disposing of the public lands, to reserve the mines for the use of the United States.

If that policy was of long standing and well established in 1840, when that case was decided, much more was it well established in 1849 when the grant of swamp lands was made to Louisiana. True, there was no express exception of minerals in the Act of 1849, but that is not controlling or determinative. Neither was there express exception in the grant of "school sections" to the State of Utah in its enabling

act. Yet this court held that that act must be interpreted in the light of the established policy and in effect read into the grant such an exception. *United States* v. *Sweet*, 245 U. S. 563. The decision in that case so effectually disposes of the question and so thoroughly reviews the authorities as to render further discussion unnecessary.

II

The Secretary of the Interior has jurisdiction to determine the character of the lands, and the order for a hearing for that purpose being interlocutory in character, this suit is premature

It seems clear from the bill of complaint that the State of Louisiana is not basing its claim to these lands solely upon the Act of March 2, 1849, but is relying as well upon the Act of September 28, 1850. But whether it relies upon the Act of 1849 or that of 1850 is immaterial on the question of the jurisdiction of the Secretary to order a hearing.

Under the 1849 Act, there must be an approval by the Secretary of the Interior of lands listed as swamp and overflowed. Under the 1850 Act, a patent must issue. In the one case the statute declares that "upon that *approval*, the fee simple to said lands shall vest in the said State of Louisiana"; in the other, "on that patent, the fee simple to said lands shall vest * * *."

Now it is not disputed that no *patent* has issued for these lands, so that if the claim is asserted under the 1850 Act, the title is yet in the United States.

Equally clear is it that no *approval*, as required under the 1849 Act, has been given.

It is a fact that the *Commissioner of the General Land Office*, in his decision of November 13, 1919, found, from the field notes of the Survey of 1871, the lands to be swamp or overflowed, but the *Secretary has not so found*. In this respect the Court of Appeals fell into error, for it distinctly said (R. 34) that both the Commissioner *and* the Secretary so found. The record is to the contrary. The decision of the Secretary was on the appeal of the State from the order of the Commissioner directing a hearing as to the mineral character. The Secretary was not called upon to pass upon the question of whether the lands were swamp or overflowed and properly subject to the claim of the State, nor did he do so. It would be going a long way to construe into an approval of the list his action in affirming the order for a hearing. Moreover, that is not the procedure by which approval is given. The practice is to have a list of lands made up in the General Land Office, embracing tracts selected and which have been found subject to the grant; this "clear list" is forwarded by the Commissioner to the Secretary for approval; the latter's approval is endorsed thereon and that is the "approval" upon which the fee simple vests in the State.

Now, if no approval has been given nor patent issued, the power of the Secretary to inquire into the extent and validity of the rights claimed against the government by the State with respect to these

lands, still continues. It does not cease until the *legal* title passes. *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 593; *Lane* v. *Mickadiet*, 241 U. S. 201; *Cameron* v. *United States*, 252 U. S. 450, 460, 461.

The question of the character of the land was one for the Land Department. *Cameron* v. *United States, supra*, p. 461, 462.

The legal title to these lands being still in the United States, and there being jurisdiction in the Land Department to inquire into their character, the courts are without power to intervene while the grant is in process of administration; the matter is still *in fieri* in the Land Department. *Minnesota* v. *Lane*, 247 U. S. 243; *Brown* v. *Hitchcock*, 173 U. S. 473, 478; *Plested* v. *Abbey*, 228 U. S. 42, 51; *Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 392.

Oregon v. *Hitchcock*, 202 U. S. 60, is very much in point. The State sought an injunction against the Secretary of the Interior to restrain him from allotting or patenting to Indians or others, lands within the Klamath Indian Reservation, to which it claimed to be entitled under its swamp grant. It also sought a decree establishing its title to these lands. It appeared that the State had made application for the lands as swamp and overflowed, but that its application had been rejected "upon the sole ground that the lands, whether swamp and overflowed or not, were not granted to the State. * * *" This court held that the suit was one against the United States and not maintainable for

that reason, but also held that the grant was in process of administration and hence that the court could not interfere. Particularly pertinent is the statement (p. 70):

> There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860.

If the court in that case could not interfere when the State application had been *rejected* without an adjudication by the Secretary of the swamp character of the land, much less can it interfere in this case where the Secretary, without rejecting the application, has not yet passed upon that question.

It is important to bear in mind that no definite, final action has been taken by the Secretary adverse to the State. What the State is complaining of is an order for a hearing to determine the character of the land; what it seeks to restrain is the execution of that order, the holding of a hearing. There has been no rejection of the State's claim, nor can it be said that there ever will be. The decision on the question of the mineral character of the land may be such as will enable the State to secure the lands. Surely while the question of the right of the State is being adjudicated by the Land Department and in the absence of a final rejection of the State's claim, action by the courts is premature, *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 308; *Lane* v. *Mickadiet, supra; United States* v. *Illinois Cent. R. R. Co.*, 244 U. S. 82; *Cameron* v. *Weedin*, 226 Fed. 44.

In this respect the case at bar is easily distinguishable from *Payne* v. *Central Pac. Ry.*, 255 U. S. 228, and *Payne* v. *New Mexico*, id. 367, for in each of these cases the Secretary had decided that a tendered selection should be cancelled or rejected. Here the order is interlocutory only.

If there be jurisdiction in the Secretary to determine the character of the lands, the possibility that he may err in his judgment is not sufficient to warrant action by the court. Jurisdiction is the power to decide, not merely the power to decide correctly. *Fauntleroy* v. *Lum*, 210 U. S. 230, 235; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305–308.

The Court of Appeals labored under the misapprehension that the *approval of the survey* of 1871 had the effect of vesting full title in the State. There is no support for such a view.

It is settled law that while the swamp land grant was a grant *in præsenti* and gave an inchoate title, yet the lands need to be identified as lands that pass under the act. It belongs to the Secretary of the Interior to make this identification, and until that is done the State's title is not perfected. *Rogers Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559; *Michigan Land and Lumber Co.* v. *Rust*, *supra*; *Sawyer* v. *Osterhaus*, 212 Fed. 765.

Even if at the date of the act the land was in fact swamp or overflowed, yet unless it was identified as such by the Secretary of the Interior, the State never acquired more than an inchoate title to it, a claim which is imperfect both at law and in equity. *Little*

v. *Williams*, 231 U. S. 335, 340; *Chapman & Dewey* v. *St. Francis Levee Dist.*, 232 U. S. 186, 198. No mere claim that lands are swamp and overflowed can make them such, unless it is sustained by competent authority to that effect. *United States* v. *C. M. & St. P. Ry. Co.*, 218 U. S. 233. It is therefore apparent that the approval of a survey is not the "identification" referred to in the decisions, which is to be followed by "approval." Moreover, the Secretary does not approve a survey; that is a function of the Commissioner of the General Land Office. *United States* v. *Morrison*, 240 U. S. 192, 210.

There having been no identification of these lands as swamp and overflowed, no title has become perfected in the State of Louisiana; its title is still inchoate and the Land Department retains full right to adjudicate the claim. This right to inquire as to the mineral character of the land would exist even if *equitable* title had vested, for while the *legal* title remains in the United States, all inquiry as to rights asserted are cognizable in the Land Department.

We could properly close the discussion upon this point here, for the enjoining of the Secretary from proceeding to a hearing upon a matter within his jurisdiction—indeed solely within his jurisdiction—and while the matter is still in process of administration before him, is an unwarranted interference with his functions.

However, the State has raised a further question, and that is as to the scope of the inquiry as to the mineral character of the lands—the time to which the

hearing must relate. The State's position is that the character of the lands must be determined as of the date of the granting acts (1849 or 1850) or at the latest, the date of the second survey (1871). The order for hearing does not specify the date to which the hearing shall be directed. But in view of the decisions of the Secretary it is evident that he regards the question open as of the present time, inasmuch as it is held that equitable title has not vested since no identification of the lands as swamp and overflowed has been made by him.

The rule applicable to railroad grants, which, like the swamp grants, are grants *in praesenti*, is that the mineral character can be determined as of any date up to issuance of patent. *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288.

The rule applicable to grants to States for school, educational, and other purposes is that the known character of the lands when the right of the State attaches, governs; which, as to specific sections, is the date of the granting act if surveyed or at survey, if unsurveyed; and, as to other lands at the date when, under the applicable law, equitable title vests in the State. *United States* v. *Sweet*, *supra*; *Payne* v. *New Mexico*, 255 U. S. 367, 370, 371; *Wyoming* v. *United States*, 255 U. S. 489, 500. If the rule of the *Barden case* is applicable to swamp grants, clearly the question of whether these lands are *now* known to be mineral is properly within the scope of the hearing which has been ordered.

The rule applicable to grants to the states of lands in place for school purposes cannot properly be applied to swamp grants, for the specified sections granted are identified by the survey and nothing further is necessary to give definiteness and yet, even under this grant, it is within the power of the executive to make other disposition of the lands, even though surveyed, if the survey has not been approved by the Commissioner of the General Land Office. *United States* v. *Morrison, supra.* As to swamp lands, the survey does not identify them as such; it does not make them swamp or overflowed.

We think that, assuming the rule as to railroad grants inapplicable, the proper one is that stated by the Secretary, namely, the question of the mineral character is open and to be determined as of the time when the *equitable title* vests. In determining when the equitable title vests it is important to note that under the act of 1849, the State is required to defray the expenses of an *examination* of the lands, which is to be made under the direction of the Secretary, by deputy surveyors; a *list* of the swamp lands is to be made out and certified by the deputies and the surveyor general to the Secretary for his approval. Under the Act of 1850, the Secretary is to make out a list of the lands, transmit it to the Governor of the State, and at the request of the Governor, cause a patent to be issued.

Both statutes are clear in pointing out the Secretary as the one to ultimately determine the character of the lands, and the action which he takes

is entirely distinct from the identification of the lands by the survey. Otherwise, if the lands were surveyed when the grants were made, there would be no judicial function necessary on his part.

The approval which, under the 1849 Act, the Secretary is to give the list, is but the evidence of a previous determination by him that the lands are subject to the grant. The same would be true of his action under the 1850 Act.

Here we may call attention to the fact that the Supreme Court of Louisiana has construed the swamp acts as requiring a listing or selection of the land as a prerequisite. *McDade* v. *Bossier Levee Board*, 109 La. 625; *Hartigan* v. *Weaver*, 126 La. 492; *Elms* v. *Elliott*, 129 La. 978. In *Vicksburg, etc., R. Co.* v. *Tibbs*, 112 La. 51, the contention was made that, without regard to selection or approval, land of the requisite character was acquired under the swamp grants. The court said (p. 59):

> The Acts of 1849 and 1850 (9 Stat. 352, 519) were clearly not intended to operate against the will of the State. Upon the contrary, they distinctly left it to the State to select, subject to the approval of the Secretary of the interior, the lands which it might consider within the terms of the grant. Whether the State might have selected the tract in question, and *whether such selection might or would have been approved*, need not be here considered.

These Louisiana cases are also noteworthy as showing that both the Acts of 1849 and of 1850 were considered applicable to the State, and no distinction was made as to rights thereunder.

The Court of Appeals confused the identification of the lands by the survey with the identification required by the Secretary of the lands as subject to the grants. Referring to the statement of the Commissioner in his letter of November 13, 1919, that the survey of 1871 would be followed in the *adjudication* of claims, it said (R. 35):

> It therefore appears that the department has, at all times, recognized the finality of the approval of the survey of 1871, as settling the character of the lands as swamp and overflowed.

And (R. 37) that the fee passed with the approval of the survey of 1871.

Perhaps the court reached this conclusion partly from the ruling of the Secretary in *State of Louisiana*, 32 L. D. 270, 276, wherein it was decided that "all future selections under said grants will be disposed of according to the showing evidenced by the field notes of survey alone." But, however arrived at, the conclusion reached totally ignores the plain provisions of the acts. *Lists* are to be made up and either approved or patents thereon issued. Yet, under the view of the Court of Appeals, all this is unnecessary, for title has already passed by the approval of the survey, hence, at most, the Secretary's action is purely ministerial.

This is but a variation of the contention made to, but rejected by, this court in *Chapman & Dewey Lumber Co.* v. *St. Francis Levee Dist.*, 232 U. S. 186, 198, and *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 31, that although not selected, lands passed to the State because they were of the character eligible to pass under the grant. The logic of that would be that the Secretary made his finding that the lands were of the character subject to the acts before he knew what or where they were. Furthermore, in approving a survey, the Commissioner of the General Land Office passes only upon the technical sufficiency of it as an engineering proposition, and its conformity to the statutory requirements and the regulations of the department.

Now, as has already been pointed out, the Secretary has as yet made no determination as to the swamp character of the lands. Hence, as said in *Little* v. *Williams, supra*, as the land was never identified, it follows that, even if at the date of the act the land was in fact swamp or overflowed, the State never acquired more than an inchoate title to it—a claim which was imperfect both at law and in equity. Therefore, as the equitable title has not vested, the question of the known character of the land in so far as minerals are concerned, may be determined as of the present time.

III

The suit is one against the United States

The effect of the decree below is to divest the United States of title to these lands, for under it the

Secretary may do nothing with respect to them save to take "such immediate steps as are necessary to the further and final recognition of plaintiff's rights * * * to the end that evidence of title may be given to the plaintiff * * *."

Thus, without an opportunity for the United States, the title holder, to be heard, the title to the lands is adjudicated. Certainly this is trying its title "behind its back," which this court declared in *Louisiana* v. *Garfield*, 211 U. S. 70, could not be done. Singularly enough, that case involved a claim of Louisiana under this same act and practically the same contention as to title or right to the land there involved was asserted as is asserted here. In that case there had been an approval of lands to the State of Louisiana under the Swamp Act of 1849; this was vacated by a succeeding Secretary and directions given for disposal of the lands as provided by law, on the ground that they were not subject to the Swamp Act, since, at the date of that act, they were within a military reservation. It was asserted by Louisiana that upon the approval given by the Secretary to the swamp claim, the title to the land passed. The court said that even assuming that the United States clearly had no title to the land in controversy, the bill could not be maintained because the approval proceeded upon a mistake of law. The only doubt was whether the statute of limitations barring suits to vacate patents after five years was applicable and confirmed the title though the

approval was void. As to that the court said (p. 77):

> But that doubt can not be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. The United States fairly might argue that the statute of limitations was confined to patents, or was excluded by the act of 1871. If it yielded those points it still reasonably might maintain that a title could not be acquired under the statute by a mere void approval on paper, if the United States ever since had been in possession claiming title, as it claimed it earlier by the act of 1871. It might argue that, for equitable relief on the ground of title in the plaintiff, in the teeth of the last-named act, it would be necessary at least to allege that the State took and has held possession under the void grant. The United States might and undoubtedly would deny the fact of such possession, and that fact can not be tried behind its back. It follows that the United States is a necessary party and that we have no jurisdiction of this suit.

It will be perceived that that case was stronger than the case at bar, for here there has been no approval.

Oregon v. *Hitchcock*, 202 U. S. 60, is likewise in point. There, selection made by Oregon of lands which it claimed under its swamp grant had been rejected on the ground that regardless of whether the lands were swamp and overflowed, they were not granted to the State by the act. It was held that the suit was one against the United States and

could not be maintained. To the same effect are *Naganab* v. *Hitchcock*, 202 U. S. 473; *New Mexico* v. *Lane*, 243 U. S. 52. The case of *Payne* v. *Central Pacific Railway Co.*, 255 U. S. 228, is not in conflict. In that case an indemnity selection list filed by the railway company was conceded to be regular and of lands subject to selection. The only objection to its approval was that after all requirements had been met by the company the lands had been included in a power site withdrawal and the Secretary had directed the cancellation of the filing on that ground. It was argued that as the Act required an approval by the Secretary, which had not been given, the equitable title had not vested. It was held that the equitable title had vested and that there remained a mere ministerial duty on the part of the Secretary. It is important to note, however, that in considering what was implied in the requirement for approval, the court said (p. 236):

> Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and *that the lands selected are such as are subject to selection.* [Italics supplied.]

In the instant case the Secretary is exercising a judicial function, one devolving upon him under the law, to determine the character of the land, whether,

in the language of *Payne* v. *Central Pac. Ry. Co.*, "the lands selected are such as are subject to selection." Yet the decree appealed from requires him to desist from doing this very thing.

While he is discharging the duty imposed upon him and exercising a function of that character, he cannot be subjected to the restraint of the courts. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683; *Hall* v. *Payne*, 254 U. S. 343.

IV

The Homesteaders are Indispensable Parties

Nearly all the tracts involved in the state's claim are covered by homestead applications or entries, as specified in Exhibit "A" at R. 24. Most of these have been allowed subject to the swamp land claim. This suit by the state ignores the inchoate rights of these homesteaders and seeks a vesting of the title to the lands in the state without any opportunity for them to be heard. We think that under decisions of *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578; *New Mexico* v. *Lane*, 243 U. S. 52, 58, and *Brady* v. *Work*, 263 U. S. 435, the homesteaders are necessary parties and the suit cannot proceed in their absence.

Their situation is not unlike that of the pre-emptioners considered in the *Litchfield* case. The plaintiff there asserted, as does Louisiana here, that he had *legal title* to the lands and sought to restrain the land officials from entertaining applications of

preemption claimants in support of their right to the lands. It was said (p. 578):

> These persons are the real parties whose interests are to be affected, and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without possibility of a hearing on the part of the party interested.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals was erroneous and should be reversed and the cause remanded to the Supreme Court of the District of Columbia with directions to dismiss the bill.

JAMES M. BECK,
Solicitor General.
IRA K. WELLS,
Assistant Attorney General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General.

APRIL, 1924.

APPENDIX

DEPARTMENT OF THE INTERIOR,
Washington, July 18, 1921.

D. 38573.

State of Louisiana.
"G."
Baton Rouge 855508.
Baton Rouge swamp-land claims.
Hearing ordered.
Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE

The State of Louisiana, claiming under the swamp-land grant certain described lands in township 18 N., R. 14 W., La. M., Baton Rouge land district, has appealed from the decision of the Commissioner of the General Land Office, dated November 13, 1919, in which the State was advised that it would be allowed 30 days within which to apply for a hearing whereby it might be shown that the lands were nonoil and nongas in character. The State was further advised that in the event of default its swamp-land claim to the tracts would be rejected and said lands would be held and treated as subject to disposition under the applicable public-land laws.

In his decision the commissioner said:

> In conclusion: It is found from the field notes of the survey of 1871 that the lands hereinafter described are swamp or overflowed, and if nonmineral in character inure

> to the State under its grant and may be patented pursuant thereto when the record has been cleared of adverse claims.

Following the above excerpt the commissioner described certain tracts and noted where adverse filings or claims had been presented for the same.

Counsel on behalf of the State broadly contend in support of the appeal that the swamp-land acts constituted a present grant without restriction or reservation as to minerals. In their printed brief appears the following:

> The appeal is based upon the ground that with the determination of the question as to the swampy or nonswampy character of the lands the jurisdiction of the Land Department is at an end, save and except for the performance of the ministerial duty of passing to the State the evidence of the title inuring upon the determination of the swampy character of the lands.
>
> * * * * *
>
> Under the fact finding of the commissioner, therefore, it is respectfully submitted that his legal conclusions are erroneous—
>
> First. The swamp-land act constituting a present grant of all overflowed lands without restriction or reservation as to mineral lands, no such exception can now be written into the grant;
>
> Second. If it should be held that an exception of mineral lands could be read into the swamp-land grant to Louisiana, the department would have no right to refuse its approval to the State to lands which were not in 1849 *known* to be mineral lands; and
>
> Third. As before pointed out, the granting act lays the burden upon the Land Department to cause an examination to be made of the lands, and likewise the duty of causing a

> list of the lands falling within the purview of the grant to be made out, upon which the act provides the Secretary "shall approve the same" as evidence of fee-simple title.

By departmental order of December 15, 1908, the public lands in the above township, and in many others, were withdrawn from settlement and entry, or other form of appropriation, to conserve the public interests and in aid of such legislation as might thereafter be proposed or recommended. By presidential order of July 2, 1910, the above withdrawal was ratified, confirmed, and continued in full force and effect; and subject to all the provisions of the withdrawal act of June 25, 1910 (36 Stat. 847), the lands were withdrawn in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States and included in petroleum reserve No. 4. The township has been reported as lying in the oil and gas bearing region of Louisiana. This department is advised that drilling has demonstrated the mineral value of a part of the township, while the remainder is undeveloped; that in January, 1918, the Bio Gas & Oil Co. completed a 6,000,000 cubic foot gas well in section 27 in the old bed of Cross Lake, and that in the northern portion of the township to the south other large gas wells have been brought in, one with a reported capacity of 12,000,000 cubic feet. It may well be that the State's earnest contentions in support of this appeal are induced as much by its inability to show the nonmineral character of the land as by confidence and belief in the soundness of its argument.

The questions suggested are hardly matters now open to disputation before this department.

In its instructions of May 25, 1918 (46 L. D. 389), the department concluded that until patent

issued the State's swamp claim was incomplete and inchoate, and the mineral character of the lands might be investigated and determined, and, further, that if the lands were adjudged mineral, patent must be denied because mineral lands do not inure to the State under the swamp-land grant.

In the case of the State of Florida (47 L. D. 92), it was held (syllabus):

> The claim of a State to land under its swamp-land grant is incomplete and inchoate, and does not become perfect, as of the date of the act, until patent is issued conveying the fee simple title; and until so patented the Land Department has jurisdiction to investigate and determine both the swamp and overflowed condition of the land as well as its mineral character.

Rehearing in that case was denied, the department stating that it found no reason for changing its views as expressed in the decision on appeal. (47 L. D. 93, 95.)

More recently, in the case of State of Louisiana (47 L. D. 366), it was held (syllabus) as follows:

> Only upon approval by the Secretary of the Interior under the act of March 2, 1849, granting swamp and overflowed lands to Louisiana, or the issuance of patent under the general swamp act of September 28, 1850, does the fee-simple title vest in the State; prior thereto its title is inchoate and imperfect both in law and in equity.
>
> * * * * *
>
> Lands embraced within a petroleum withdrawal are thereby impressed with a *prima facie* mineral character; and the burden is upon the State to overcome this or suffer the rejection of its claim thereto under the swamp-

land grant, which does not embrace mineral lands.

In the course of that opinion it was said:

> The lands involved in the present appeal, as before stated, are within the limits of the petroleum withdrawal. They are thereby impressed with a *prima facie* mineral character. *Washburn* v. *Lane* (258 Fed. 524). This is so although one of the purposes of the withdrawal has been accomplished in the passage of the general leasing act of February 25, 1920 (Public, No. 146). Deposits of oil and gas are now subject to disposition only in the form and manner provided in that act. This department has no power or authority to pass title to oil and gas lands except in the manner prescribed by Congress. * * *
>
> The Commissioner of the General Land Office in the Ferry Lake case early expressed his opinion to the effect that mineral lands did not pass under the swamp-land grant. In the case of Sabine Islands, selected by the State as swamp, this department caused a careful field investigation to be made which resulted in a nonmineral report as to such lands before the selection list was approved. With all due deference to the expression contained in the opinion dated September 11, 1916, of the Acting Attorney General concerning Ferry Lake lands, this department, with which rests the jurisdiction and duty of determining in the first instance what lands are to be patented or approved under the swamp-land grant, is not pursuaded that lands mineral in character are included in such grant. The position taken in the department upon this question has been uniformly consistent since it first arose. The soundness of the argument and contention of counsel is not conceded. The State must bear the burden of making out a

case to overcome the *prima facie* mineral character of the land where the same is included in petroleum withdrawal or suffer the final rejection of its swamp-land claim.

The commissioner's action in ordering the hearing is sustained. The decisions called in question by the appeal are affirmed.

Directly referring to the lands in this township here involved, this department, in its instructions of September 2, 1919, in part, said:

> The department has held that mineral lands do not pass or inure to the State under its swamp-land grant. The claim of the State is incomplete and inchoate until the fee title is granted by either patent or certifications and the mineral character of claimed swamp land can be investigated and determined up to the time the legal title passes. See instructions of May 25, 1918 (46 L. D. 389). In the case of State of Florida (47 L. D. ———), decided upon appeal March 20 and upon rehearing May 14, 1919, a phosphate withdrawal was held to constitute a bar to the approval of the State's swamp selection. In instructions of April 26, 1915, unreported, the department concluded that there was such an intimate association and relation between oil and natural gas that lands withdrawn because of their oil deposits were also withdrawn for their gas content, and also that an oil withdrawal constituted a report that the lands were valuable for their deposits of natural gas. The reported production of gas in the southern portion of this township and upon neighboring lands amply demonstrates the wisdom of the existing withdrawal. Unless the State is prepared to and will show that its selected swamp lands within the withdrawn area are in fact nonoil and nongas in character its list after due notice must be rejected and

canceled. In this connection see the case of State of California *et al.* (41 L. D. 592), State of Wyoming (45 L. D. 590, 46 L. D. 34); *Buena Vista Land and Development Company* v. *Honolulu Consolidated Oil Company* (134 Pac. 1154), all involving State school selections intercepted by oil withdrawals.

This opinion might well rest at this point upon the reasons set forth and the authorities cited in the instructions and decisions above mentioned. The importance of the question involved, both to the State and to the Federal Government and the argument of counsel have, however, induced further investigation and consideration of the entire matter. This department is firmly convinced that the public policy of the Government, as expressed by Congress and gathered from the entire body of land legislation, has always been to reserve from sale, grant, or disposal, mines and mineral lands unless otherwise expressly directed by law.

> In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. (Section 2318, Revised Statutes.)
>
> It has been the policy of the Government, at all times, in disposing of the public lands, to reserve the mines for the use of the United States. (*United States* v. *Gratiot*, 1840, 14 Pet. 526–538.)
>
> Until 1866, no legislation was had looking to a sale of mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. (*Jennison* v. *Kirk*, 98 U. S. 453–458.)
>
> It could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States * * * we are forced to the conclusion that Congress

did not intend to depart from its uniform policy in this respect in the grant of those sections to the State. (*Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167–174.)

No title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preemption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specifically authorizing the sale of such lands. (*Deffeback* v. *Hawke*, syllabus, 115 U. S. 392–404.)

While the early land laws occasionally and specially provided for the sale of mineral lands, they very generally evinced a purpose to reserve such lands for future disposal; and this purpose was given particular emphasis following the discovery of gold in California in 1848, as is shown in the Oregon donation act, the homestead act (which adopted the mineral land reservation of the preemption act of 1841), the grant to the several States for the benefit of agricultural colleges, the railroad land grants and other land acts of that period * * * these declarations were but expressive of the will of Congress that every grant of public lands, whether to a State or otherwise, should be taken as reserving and excluding mineral lands in the absence of an expressed purpose to include them; and upon this theory both declarations were carried into the Revised Statutes as being general and permanent in their nature. (*United States* v. *Sweet*, 245 U. S. 563, 568, 569.)

Congress, on the 4th of July, 1866, 14 Stat. 85, by an act concerning lands granted to the State of Nevada, among other things reserved from sale all mineral lands in the State, and authorized the lines of surveys to be changed from rectangular, so as to exclude them. This was doubtless intended as a construction

of the grant under consideration; but whether it be correct or not, and whatever may be the effect of the grant in its original shape, it was clearly competent for the grantee to accept it in its modified form, and agree to the construction put upon it by the grantor. The State, by its legislative act of February 13, 1867, ratified that construction, and accepted the grant with the conditions annexed.

We agree with the Supreme Court of Nevada, that this acceptance was a recognition by the legislature of the State of the validity of the claim made by the Government of the United States to the mineral lands. (*Heydenfeldt* v. *Daney Gold, etc. Co.*, 93 U. S. 634–641.)

In *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167, this court decided that "the grant of the sixteenth and thirty-sixth sections of public land to the State of California for school purposes, made by the act of March 3, 1863, was not intended to cover mineral lands. Such lands were by the settled policy of the General Government excluded from all grants" at that time. (*Mulland & Another* v. *United States*, 118 U. S. 271–276.)

The act of May 17, 1856, making a grant of lands to the State of Florida to aid in the construction of railroad does not in express terms include mineral lands, nor are such lands expressly excluded therefrom, but in view of the uniform and settled policy of the Government to reserve such lands from grants to States or corporations for any purpose, it is held that all such lands, whether valuable for phosphate or other mineral deposits, are excepted from the operation of said grant. (Florida Central and Peninsular R. R. Co., syllabus, 26 L. D. 600.)

That the swamp-land acts do not, of their own force, create a present grant of a complete title in the State is apparent from the authorities contained in

the instructions and decisions hereinbefore cited. As additional and supplemental to such citation, the following are in point:

> In *Heath* v. *Wallace*, 138 U. S. 573, 585, it was held that "the question whether or not lands returned as 'subject to periodical overflow' are 'swamp and overflowed lands' is a question of fact properly determinable by the Land Department."
>
> * * * * *
>
> In the case of the *Central Pacific Railroad Company* v. *Valentine*, 11 Land Dec. 238, 246, the late Secretary of the Interior, Mr. Noble, speaks of the practice of the Land Department in issuing patents to railroad lands. His language is: "The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uni-

formly followed and generally accepted for so long a time there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property." (*Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 328, 329.)

* * * no mere claim that they were swamp or overflowed lands could make them such, unless it was sustained by some decision or ruling by competent authority to that effect. * * * In determining this case it must not be overlooked that the act of Congress confers upon the Secretary of the Interior, and upon him alone, the power to identify particular lands as swamp and overflowed lands embraced by the act of 1850. Referring to the second section of that act, Mr. Justice Miller, speaking for the court in *French* v. *Fyan*, 93 U. S. 169, 171, said: "It was under the power conferred by this section that the patent was issued under which defendant holds the lands. We are of opinion that this section devolved upon the Secretary, as the head of the department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and *made his office the tribunal whose decision on that subject was to be controlling.*" To the same effect, on this point are *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 68, and *Rogers' Locomotive Machine Works* v. *American Emigrant Co.*, 164 U. S. 559, 571. In the latter case the court said: "The identification of lands as lands embraced by the swamp-land act was therefore necessary before the State could claim a patent or exercise absolute control of them." (*United States* v. *Chic., Mil. & St. P. Ry.*, 218 U. S. 233, 240,

> This conclusive view is clearly pointed out in *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, *supra*, pages 196, 197. And that case also, page 196, completely answers the argument that although the land was not embraced in the selection, was not included in the township because unsurveyed, and did not pass by the patent or the selection independently considered, it yet must be treated as having passed to the State under the swamp-land act of 1850, because it was eligible to be selected under that act. (*Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 31.)
>
> As to three of the tracts the swamp-land claim was examined and rejected by the department some time before this suit was begun, and as to the other two it was still pending. * * * The situation, then, at the time the case was heard in the trial court was this: The railroad company had neither the legal nor the equitable title to four of the tracts. Instead, the full title was in the United States and all existing claims to them arising under the land grants and other public land laws were pending in the Land Department, whose officers were specially charged by law with their examination and determination and with the disposal of the title accordingly. * * * Whether the tracts as to which the swamp-land claim is still pending were such as came within the terms of the swamp-land grant is a question of fact the decision of which is expressly committed to the Land Department. * * * (*Northern Pac. Ry. Co.* v. *McComas*, 250 U. S. 387, 389, 392.)

That the department is not alone in its conclusions and interpretations with respect to the holdings of the Supreme Court of the United States regarding swamp land is indicated by the following decisions:

As soon as there has been legal selection of swamp and overflowed lands tantamount to indentification the State must be considered to have acquired the equitable title, which it can dispose of as it may deem advantageous or profitable. However, prior to the passing of the legal title by the issuance of a patent, the grant is said to remain in process of administration, and the Land Department of the General Government is not precluded from entertaining jurisdiction to determine in a proper case whether such equitable title has passed. * * * The action, therefore, of the governor in making the selection from legal subdivisions and actual surveys upon the ground, and the filing of his list in the local land office without the sanction, confirmation, or ratification of the Secretary of the Interior, was not an identification of such land as swamp and overflowed land.

Prior to identification there could be no title in the State to any segregated parcel of land. The general grant of swamp and overflowed lands entitled the State to the selection, and when made an equitable title would vest, to obtain, in course of administration, until yatent issued, when the legal title would become perfect. Prior to any selection the grant was in praesenti, it is said; but it is in the nature of a float, which attached to no particular parcel, and while the State might have contracted with reference to its anticipated title, it was vested with no specific interest in any particular tract that it was authorized or empowered to transfer or convey, because the United States had parted with nothing of the kind. The selection and identification was made an essential condition to the transfer or vesting of any specific title or other interest whatsoever; otherwise, the grant remained a float still, and was no one's land, but that of the

General Government, with obligations to make selections, and when made to convey the title by patent. The grant being in praesenti, it took precedence of other grants of public lands but vested no immediate title or interest in any particular parcel until identification, at which time, and not before, it attached definitely with relation back. The State therefore, prior to identification acquired no interest that it could convey. It could contract with relation to its swamp-land grant, perhaps, but it could convey no interest in any particular parcel. In this view, it is plain Miller acquired no vested or equitable interest in the land in dispute through his deed from the State, without previous selection and identification, that could avail him as against the General Government or its grantees. While the deed from the State might operate as a contract that would require the State to confirm its title to the purchaser when obtained, yet it did not convey any interest that the General Government was bound to take cognizance of or to protect, because not sanctioned by its authority. (*Kerns* v. *Lee*, 142 Fed. 985, 991, 992, 993.)

Under the act of Congress of September 28, 1850 (9 Stat. 519), granting to certain States swamp and overflowed lands and requiring the Secretary of the Interior to prepare and transmit an accurate list and plat of such land to the governor of each State, upon whose request a patent therefor should issue to the State, the legal title to such land remains in the Federal Government until such patent is issued; following *Warner Valley Stock Co.* v. *Smith*, 9 App. D. C. 187.

Where the Secretary of the Interior under that act prepares and transmits such a list and plat to the governor of one of the States named, the Secretary or his successor in office has the power at any time prior to the

issue of a patent to vacate and annul such list and plat. (Syllabus, *Brown* v. *Bliss*, 13 App. D. C. 279.)

* * * it must now be regarded as definitely settled by the later cases from the Supreme Court that, while concededly the act was by its terms a grant in praesenti, the legal title to the lands granted thereby vests in the State only upon definite identification of the lands to which it attached in the manner provided in the act, and that, until the ascertainment of that fact and the issuance of patent, the legal title remains in the Government, and that of the State is merely inchoate. (*Rogers' Locomotive Works* v. *Emigrant Co.*, 164 U. S. 568, 17 Sup. Ct. 188, 41 L. Ed. 552; *Michigan Land, etc., Co.* v. *Rust*, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591; *Brown* v. *Hitchcock*, 173 U. S. 476, 19 Sup. Ct. 485, 43 L. Ed. 772; *United States* v. *Chicago, etc., Ry. Co.*, 218 U. S. 242, 31 Sup Ct. 7, 54 L. Ed. 1015; *McCormick* v. *Hayes*, 159 U. S. 338, 16 Sup. Ct. 67, 40 L. Ed. 171; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186, 34 Sup. Ct. 297, 58 L. Ed. ——, decided January 26, 1914; *Sawyer* v. *Osterhaus*, 212 Fed. 765, 769.)

Counsel contends that the department, in its application and interpretation of the swamp-land grant undertakes to read into the statute a reservation of the mineral which Congress had not written therein. This suggestion is not well founded. The response might well be that the State is undertaking to read into the statute a provision expressly including therein all mineral lands. The authorities are clear, and the practice of this department has been uniformly to the effect, that unless minerals are expressly included by the grant they do not pass thereunder.

The contention of counsel to the effect that in any event the land must have been known to have been mineral in character at the date of the passage of the granting act, is not impressive. That argument is fully foreclosed by the principle found to be controlling in the case of *Barden* v. *Northern Pacific Railroad Company*, 154 U. S., 288, the conclusions reached by the department in the case of *Central Pacific Railroad Company* v. *Valentine*, 11 L. D. 238, and other like cases.

The views entertained by the department with respect to this matter will be followed until Congress expressly directs that mineral lands are and shall be included within the swamp-land grants or until the Supreme Court definitely decides that mineral lands do inure to the State under those acts. The well-established practice of refusing to certify or patent to the State under the swamp-land acts lands determined to be mineral in character is adhered to and governs this case. The decision appealed from is affirmed.

The single question presented and decided herein has been fully considered heretofore as well as in the pending case, and has always been adjudicated adversely to the contentions urged on behalf of the State. It is not perceived that any useful purpose would be subserved by allowing time for a formal motion for rehearing. This decision is declared to be final and conclusive and further proceedings will be in harmony with the views above expressed. The record is transmitted to the Commissioner of the General Land Office.

(Signed) E. C. FINNEY,
First Assistant Secretary.

○

(17)

FILED

SEP 11 1928

WM. R. STANSBURY

Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. [redacted] 6

HUBERT WORK, SECRETARY OF THE INTERIOR,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

Appeal from the Court of Appeals of the District of Columbia.

PRINCIPAL BRIEF

For the State of Louisiana, Appellee.

PERCY SAINT,

Attorney General of Louisiana,

[redacted]

[redacted]

Attorneys for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 39

HUBERT WORK, SECRETARY OF THE INTERIOR,
Appellant,

versus

STATE OF LOUISIANA,
Appellee.

Appeal from the Court of Appeals of the District of Columbia.

ORIGINAL BRIEF

For the State of Louisiana, Appellee.

This case involves no question of fact and but one question of substantive law: *i. e.*, whether mineral lands are ex-

cepted from the swamp land grants to the State of Louisiana (9 Stat., 352, 519); and is here on appeal by the Secretary from the decision of the Court of Appeals affirming the decree of the Supreme Court of the District of Columbia enjoining him from requiring an inquiry into the mineral character of lands in Louisiana adjudged by the Department to be swamp within the purview of the grants.

The act of March 2, 1849 (9 Stat., 352) granted to the State of Louisiana "the whole of those swamp and overflowed lands therein, and which may be or are found unfit for cultivation." The statute required the Secretary of the Treasury (afterwards the Secretary of the Interior) to cause an examination to be made of all such lands by deputies of the Surveyor General, "and a list of the same to be made out and certified by the deputies and Surveyor General to the Secretary, who shall approve the same—and on that approval the fee simple of said lands shall vest in the State of Louisiana."

By act of September 28, 1850 (9 Stat., 519), a general grant of swamp and overflowed lands was made to all the states, with provision for selection by the states and issuance of patent as evidence of fee simple title. But the act of 1849 was not repealed by that of 1850.

Louisiana v. Garfield, 211 U. S., 70.

The record discloses that the township within which are located the tracts in controversy, was first surveyed

in the year 1838, and that these lands were returned as part of the beds of Cross Bayou and Cross and Sodo Lakes; but that by later survey made in 1871, the tracts here in question were returned as land, surveyed and subdivided as such. The record also shows that the State has sought on many occasions recognition of its title to these lands either by reason of their being part of the beds of navigable bodies of water at the date of the State's admission, or as passing to the State under its swamp land grants.

February 9, 1872, previous selection lists which had been made by the State were rejected on the ground that the lands selected "consist mainly of the beds of the former lakes." (Rec., p. 11.)

January 15, 1879, the Secretary of the Interior held, with respect to these and other lands, that the State's claim should be readjudicated under the rules applicable to the swamp grant. (Rec., p. 11.)

October 1, 1903 *(32 L. D., 270)*, the Secretary of the Interior, after a full review of the action by the State of Louisiana and of the Land Department, prescribed definite rules for the adjustment of the swamp land grants to the State of Louisiana, by which rules it was made the duty of the Commissioner of the General Land Office to approve or patent pending swamp selections according to the showing in the field notes of survey; and it was in further ad-

ministration of the grants, under these specific rules, that the Commissioner of the General Land Office, in decision of November 13, 1919 (Record, page 5), reached the conclusion (Record, p. 24) with respect to the lands involved in this suit:

> "It is found from the field notes of the survey of 1871 that the lands hereinafter described are swamp and overflowed and, if nonmineral in character, inure to the State under its grant, and may be patented thereto when the record has been cleared of adverse claims."

The register of the local land office was accordingly directed to advise the State:

> 'That thirty days from notice will be allowed within which to apply for a hearing whereby it may be shown that these lands (those adjudged swamp under the Secretary's direction) are non-oil and non-gas in character. * * * In default of action hereunder by the State within the time limited its swamp land claim to the tracts immediately above described will be rejected and said lands will be held and treated as subject to disposition under the applicable public land laws." (Rec., p. 25.)

From this requirement that the State show, under penalty of forfeiture of its rights, that these adjudged swamp lands are, as a present fact, not valuable for oil or gas, the State took the case on appeal to the Secretary of the Interior, and that officer, with the whole record before him, affirmed the Commissioner's ruling; denying the State

even the ordinary right provided for in the rules of practice to apply for a rehearing. Motion for rehearing was, however, filed by the State, considered by the Secretary as an appeal to the supervisory power of the department, and overruled for the reason that "mineral lands do not inure to the State under the swamp grants," and that "the question of mineral character of lands is open to investigation and adjudication up to the time of issuance of final evidence of fee simple title." (Rec., p. 27.)

It thus is plain that the order that the State's claims be rejected and the land adversely disposed of unless the State apply for a hearing and therein prove the present non-mineral character of the lands, rests in its entirety upon the Secretary's conclusion of law that "mineral lands do not inure to the State" under the acts of 1849 and 1850.

The State of Louisiana thereupon brought this suit in the Supreme Court of the District of Columbia. The bill, after reciting the history of the case, avers that the Secretary is exceeding his power, authority and jurisdiction in the making of the unlawful and unauthorized requirement that the State apply for a hearing and therein assume the burden of showing that the lands found to be swamp and overflowed and so certified by official survey, have as a present fact no mineral value; and particularly in his order denying to the State the right to the lands if it does not undertake to assume and discharge the burden thus illegally exacted of it.

The State, therefore, prayed for an injunction, restraining the Secretary from enforcing the ruling complained of and requiring that such decision be vacated and that its rights under the swamp land grants be recognized and given full legal force and effect.

A motion to dismiss (Rec., p. 28) was overruled, and defendant declining to plead further, judgment was rendered by the Supreme Court according to the prayer of the bill commanding the defendant to vacate so much of the decision complained of as operates to withhold title from plaintiff for any reason dependent upon alleged mineral character, or requires a hearing where it may be shown that such lands are non-oil and non-gas, or otherwise non-mineral in character, and accordingly restraining the Secretary from making any disposition of said lands or from taking any action affecting the same, save such immediate steps as are necessary to the full and final recognition of the State's rights under the acts of March 2, 1849, and September 28, 1850, to the end that the evidence of title may be given to the plaintiff as by such acts required. (Rec., p. 30.)

This decree was affirmed by the Court of Appeals (Rec., p. 33), and the case is brought here by the defendant's further appeal.

ARGUMENT.

I.

The right of the State to maintain this form of action and to the relief here sought is settled by repeated decisions of this Court.

a.

The Nature of the Suit.

It is plain that no question is, or properly can be, raised in this case respecting the swampy character of the lands.

The administration of the public lands is undoubtedly under the jurisdiction and control of the Secretary of the Interior. Such jurisdiction includes, of course, the determination of all facts involved in the administration of the swamp land grants. The Secretary had here, after mature consideration, directed the Commissioner of the General Land Office to adjudicate the claim of the State according to the return made by the field notes of the government survey *(32 L. D., 270)*.

The Commissioner, acting under such instructions of the Secretary, proceeded to adjudicate the State's claim, and found and adjudged thereunder that the lands here involved were swamp, but withheld the evidence of title provided by the statute in such case because of his conclusions as matters of law:

(1) That mineral lands were excepted from the swamp land grant;

(2) That he had the right to exact of the State a negative showing, *i. e.*, that the lands adjudged by him to be swamp did not possess a present mineral value;

(3) That he might impose as a penalty for failure of the State to negative such present mineral value, a forfeiture of its swamp land claim.

Upon these conclusions of law the Commissioner ordered that unless the State should within thirty days apply for a hearing in which it would be held to prove affirmatively the present non-mineral character of the land, "its swamp land claim * * * will be rejected, and said lands will be held and treated as subject to disposition under the applicable public land laws." (Rec., p. 25.)

In its bill the State claimed that under the adjudication the swampy character of the lands was fully established, and that, therefore, the State's title was complete; the further exaction of showing that the lands are not mineral being contrary to law, and hence beyond the power of the Secretary of the Interior to impose. These facts, together with the affirmance of this order by the Secretary, are disclosed by the bill, the allegations of which are admitted by the appellant's election (Rec., p. 30) to stand on his motion to dismiss.

It is here and now urged that a formal list of the adjudged swamp lands was not made up, submitted to and formally approved by the Secretary of the Interior, and that, consequently, there was no adjudication of the swampy character of the lands by the Secretary, notwithstanding the adjudication was in accord with his direction and necessarily was before him on the State's appeal. But it must, of course, be conceded that the Secretary himself had proceeded to a final determination of the matter by his affirmance of the Commissioner's decision that the lands be approved to the State on condition that their present

non-mineral character be affirmatively proven, and that the State's claim should be canceled and adverse disposition made if the the State should not, within the delay therein fixed, assume and successfully discharge such burden.

b.

Sole Purpose of This Suit.

The sole purpose of this action is to relieve the State from the unreasonable, illegal and wholly arbitrary requirement that it prove, under penalty of loss of its rights, the non-mineral character of lands adjudged by the Department to be swamp under the purview of the statutes granting all lands of that character to the State. For it must be conceded that, if mineral lands be not excepted from these grants, the exaction of showing the non-mineral character of these lands is clearly unauthorized and arbitrary, and hence beyond the power of the executive.

c.

The Right to the Remedy Here Invoked.

In view of the property rights involved, the adjudication that the lands are swamp and the imposition, under penalty of concellation, of the requirement that the State affirmatively show the non-mineral character of the land, it is clear that the State has the right to test by means of a bill in equity the legal question whether such exaction is within the power of authority of the Secretary, and to an injunction if its position be well founded.

Such is the settled jurisprudence.

> "It is insisted by the learned counsel for the Government that the Court has no judisdiction to en-

tertain this suit, because the legal title has not yet passed from the Government, as no patent has passed. We have no disposition to question those cases in which the court has held that the courts may not interfere with the Land Department in the administration of the public lands while the same are subject to disposition under acts of Congress intrusting such matters to that branch of the Government. * * * Since Marbury v. Madison, 1 Cranch, 137, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial, or are undertaken entirely without authority, which may become the subject of review in the courts. * * * In our view, the case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. * * * There is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

Garfield v. United States, 211 U. S., 260.

"We have no doubt that the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. **If he had no power at all to do the act complained of he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law**

plainly requires him to do. As observed by Mr. Justice Bradley in Louisiana Board of Liquidation v. McComb, 92 U. S., 531 and 541:

" 'But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other.' "

Noble v. Union River Logging Co., 147 U. S., 177.

"This suit is one to restrain the appellants from an illegal act under color of their office, which will cause a cloud upon the title of appellees. This disposes of the contention of appellants that this is a suit against the United States, or one for recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the decision of the Interior Department, or a trial of a title to land not situated within the jurisdiction of the Court 'wherein an essential party is not present in the forum and is not even suable—the United States.' "

See also:

234 U. S., 540, Lane v. Watts.

255 U. S., 228, Payne v. Cent. Pac. Ry. Co.

259 U. S., 197, Santa Fe Pac. R. R. v. Fall.

Louisiana v. Garfield, 211 U. S., 70, is in nowise opposed to this view.

In that case an injunction was sought to restrain the Secretary from carrying out an order directing the disposition of certain lands under an act passed by Congress in 1871, on the ground that the property had been approved to the State under the swamp land act of 1849, and that a later order of the Secretary, attempting to vacate such approval and directing other disposition of the lands, was void. The court held that the approval was absolutely void, and the order attacked valid, unless the State had acquired title by the statute limiting suits by the United States to vacate patents to five years.

> "The doubt is whether Louisiana has not now a good title by the lapse of five years since the approval and by the operation of the act. But the doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard * * *. It might argue that, for equitable relief on the ground of the title in the plaintiff, in the teeth of the last-named act (of February 24, 1879, 16 Stat. 43) it would be necessary at least to allege that the State took and has held possession under the void grant. **The United States might, and undoubtedly would, deny the fact of such possession, and that fact cannot be tried behind its back.** It follows that the United States is a necessary party, and that we have no jurisdiction of this suit."

Manifestly, therefore, the decision in no way militates against the right of the State to enjoin the Secretary, in his administration of the Swamp Land Grant, from imposing upon the State an unauthorized condition based upon "a mistaken conception of his authority, and thereby casting a cloud upon the plaintiff's title."

Effort is made to bring this case within the ruling in *Louisiana v. Garfield* by the contention that the Secretary has not independently found as a fact that the lands are swamp. It is hardly necessary, however, to reply that, as was accepted by both courts below, the Commissioner's actions are the Secretary's, and that the finding by the Commissioner of the swampy character of the land, under the procedure prescribed by the Secretary and based upon the Secretary's instructions as to the conclusive probative character of the official field notes of survey, form the very basis upon which the Secretary has formulated his legal conclusions, and upon which he based the order here complained of. The decision that the land be approved to the State or disposed of adversely to the State, according to the State's election to put at issue and its ability to prove present nonmineral character, makes the finality of his ruling dependent entirely upon the correctness of his legal conclusion that mineral lands are excepted from the swamp land grant. This question of law, going to the power and authority of the Secretary, the State is entitled to bring into question in the manner here presented.

See *Payne v. Central Pacific Ry. Co., 255 U. S., 228,* where the identical relief was granted:

> "We are asked to say that this is a suit against the United States, and therefore not maintainable without its consent; but we think that the suit is one to restrain the appellants from cancelling a valid selection through a mistaken conception of their authority, and thereby casting a cloud on the plaintiff's title."

See, also, *Santa Fe Pacific R. R. Co. v. Fall, 259 U. S., 197-8,* in which this Court said:

> "The Government argues that there was no jurisdiction over the bills because the question whether the lands selected were of the same quality as those relinquished rested wholly in the judgment of the Secretary. But the position of the Railroad Company is that the Secretary went beyond the powers conferred upon him by the statute when he took into account facts not known at the time of the selection, and we are of opinion that the company is entitled to bring that question into court."

For, if there be no exception of mineral lands from the grants, then the Secretary has overstepped the bounds of his authority, and has entered upon the domain of legislation.

d.

Nor is this suit affected by the fact that persons are seeking to make entries of part of the lands involved.

The lands here involved have been, as before shown, adjudged swamp and overflow lands, and were so returned by the field notes of the survey of the township in 1871.

Because of the long delay of the Land Department in the administration of the swamp land grants, numerous persons have been induced since the State's application to seek entry of these and similar lands, to which the right of the State has already attached.

Under the departmental decision in this case, these lands passed under the swamp grant if non-mineral in character, and it is proposed, on proof thereof, to certify or patent them to the State and to clear the record of such applications for entry.

But, despite the departmental order that the record be cleared of such applications on proof of non-mineral character of the lands, it is here argued that these applicants are necessary parties.

This court, however, in ***Lane v. Watts, 234 U. S., 538,*** has expressly held that they are not. There, as here by the two courts below, it was specifically decided that rights accrued under congressional grants were entitled to protection by injunction against the Secretary of the Interior, and that subsequent entrymen are not necessary parties. The report of the cited case shows (p. 537) the identical question raised by the Secretary and its adverse disposition (p. 540) upon the ground that "the suit is one to restrain the appellants from an illegal act under color of

their office, which will cast a cloud upon the title of appellees. This disposes of the contentions of appellants * * * that there is a defect of parties."

So here. The right of the State accrued, if at all, prior to the entries. If the lands go to the State, no rights have been initiated by the applications. If mineral lands, however, be excepted from the grant (and these lands be adjudicated mineral), then it is of no concern to the State whether such applications are accepted or not.

If the State's contention that the Secretary's imposition of proof that the lands are non-mineral is unwarranted be well founded, then such action on his part is a mere "illegal act under color of his office," which may be enjoined in a suit against him alone; and the State prevails or loses in such suit according to the correctness of the one question of substantive law so propounded.

The Secretary cannot sustain his own disregard of law by permitting applicants to enter lands wrongly denied to the State and thereby defeat recourse to the courts to correct his abuse of power.

It is, therefore, respectfully submitted that the Court has jurisdiction; that all necessary parties are before the Court, and that the suit is in no sense one against the United States, but merely to enjoin an official from imposing upon the grantee under an act of Congress an illegal and arbitrary exaction, and from cancelling the claim of

such grantee for failure to comply with such unlawful requirement.

See *Payne v. Central Pacific Ry. Co., 255 U. S., 228,* where the identical relief was granted:

> "We are asked to say that this is a suit against the United States, and, therefore, not maintainable without its consent; but we think that the suit is one to restrain the appellants from cancelling a valid selection through a mistaken conception of their authority, and thereby casting a cloud on plaintiff's title."

II.

ON THE MERITS.

In the decision of the Commissioner, affirmed by the Secretary, "it is found from the field notes of survey of 1871 that the lands hereafter described are swamp and overflowed" (Record, p. 22), from which it is concluded, as a matter of law, that the lands, "if non-mineral in character, inure to the State under its grant". Hence, the defendant holds not only that the lands in question are swamp and overflowed lands, but that the approved evidence that the lands are of such character has been part of the records of his office since 1871. Despite such finding, however, the Secretary refuses to approve the list of such swamp land, except upon the precedent condition that the State show affirmatively that the land is not now valuable for oil or gas.

But this, under the act of 1849, the Secretary was not at liberty to do. His judicial functions ceased with the de-

termination of the question of fact that the lands were swamp and overflowed under the purview of the congressional grants.

His further finding that the lands, if now mineral in character, do not inure to the State, is simply his conclusion of law, which, if incorrect, is but a wrong reason for refusal to perform a ministerial duty. This duty, of course, is that of approving the list of lands held to be swamp, by which approval the fee simple title is vested in the State, and for which approval no particular form of words is required by statute.

Louisiana v. Garfield, 211 U. S., 70.

That the swamp land acts of 1849 and 1850 were grants *in praesenti,* importing "an immediate transfer of interest, and not a promise of transfer in the future", is too well settled to admit of argument or discussion.

Railway Company v. Smith, 9 Wall., 95.
French v. Fyan, 93 U. S., 169.
Wright v. Roseberry, 121 U. S., 488.
Tubbs v. Wilhoit, 138 U. S., 134.

But it is urged in the brief for the Secretary that the State's title prior to approval is an imperfect or inchoate one, from which it is sought to be deduced that the State is, therefore, without right to sue.

Assuming the correctness of the premise, the conclusion is a *non sequitur.*

The acts of Congress making the grants are not meaningless. They certainly convey a present interest of some kind. They purport to be present grants. That they do, this court has often held. Their subject matter—that upon which they operate—is not lands to be defined by survey, but **all lands of a certain physical character** *i. e.*, all swamp and overflowed lands.

Conceding, therefore, that the title is imperfect—inchoate, if preferred—still the State has rights as grantee by the legislative department of the United States, which alone possesses the right to dispose of the public domain. These rights, the Secretary, as representative of another department, has no right to ignore and no power to disregard.

The statute provides for the issue of formal evidence of fee simple title (by approval under the act of 1849, by patent under that of 1850) on establishment of the swampy character of the land. The Secretary adds as his contribution by way of amendment under the guise of construction of the acts, a condition that the land, in addition to its swampy character, be not valuable for minerals.

The evidence of swampy character is required merely to identify the lands as part of the subject of the grant, and that this has been done here is admitted.

The State, as grantee, then, may, and properly does, object to the imposition of a further and unauthorized condition: an arbitrary and illegal impediment to the ripening

of its title into perfect ownership under the rights plainly vested by congressional enactment.

a.

The Swamp Land Act, constituting a present grant of all overflowed lands without restriction or reservation as to mineral lands, no such exception can now be written into the grant.

It will be noted that the terms of the swamp land grants to the State of Louisiana are plain and unambiguous, so that there exists no room for "the familiar rule of construction that where a statute operates as a grant of public property * * * and there is doubt as to the meaning of its terms * * * that construction should be adopted which will support the claim of the Government." True, it may be, however, that **prior** laws, so far as they indicate any fixed legislative policy with respect to the disposition of the public lands, are to be consulted, and that the swamp land grant to the State is to be read in the light of such fixed policy as may have previously existed, as evidenced by acts of Congress. But while, by prior legislation, salt springs, lead mines, and lands contiguous thereto, had been reserved from general disposition, the reservations were, since the acts of March 3, 1811 (2 Stat., 662, 665), in the interest of and for the benefit of the States. No such defined legislative policy existed with respect to the reservation of mineral lands prior to the passage of the swamp land grant to the State of Louisiana, as could by implication constitute a limitation upon the grant. This is made

clear on analysis of the several cases wherein it might be claimed that this Court has held that the general policy regarding reservation and disposition of mineral lands must be read as a part of the specific legislation under which rights are asserted to known mineral lands.

In *Morton v. Nebraska, 21 Wallace, 660,* lands were claimed under a military bounty warrant location, "so incrusted with salt as to resemble snow-covered lakes." As the policy of the Government, with respect to the reservation of **saline lands** had been fixed by specific legislation running back almost to the inauguration of our land system, it was held that the land there involved was not subject to location; but it will be noted that **the reservation of salt springs did not rest upon an implied reservation, but upon an express exception** in both acts of March 3, 1811, as well as in the act of July 22, 1854 (10 Stat., 338), and, further, that the exception was not in favor of the United States, **but of the State.** There is nothing in the *Morton* case from which it can be deduced that any policy of reserving **mineral lands,** or even of reserving mines from the **State,** existed at the time of the passage of the swamp land grants to the State of Louisiana.

In *Mining Company v. Consolidated Mining Company, 102 U. S., 167,* the lands involved were part of a Section 36 in the State of California, being one of the two sections in each township granted to the State in aid of the common schools. In the course of the opinion the court adverts to the fact that when the country was acquired by cession from

Mexico it was found to be rich in precious metals. To use the language of the court:

> "Such was the rapid influx of immigrants from eastern states that the California population at the time it was organized as a state, in 1850, was largely composed of mining camps and settlements engaged in mining these metals."

The school grant relied upon in that case is found in the act of March 3, 1853 (10 Stat., 244). The third section of this act provides:

> "That none other than township lines shall be surveyed where the lands are mineral, or are deemed unfit for cultivation."

From this language it necessarily followed that **there could be no sections** within mineral townships. The act further provided that if, upon survey, any portion of a Section 16 or 36 be found in possession of settlers, such land was also to be excepted from the grant. The township involved was not surveyed until March, 1870. In the statement of the case it was said:

> "That the patent of the United States was issued to defendant for three several mining claims, to-wit: The Spring Hill, the Geneva and the Keystone; that the Spring Hill was located in May, 1851; the Keystone in 1853, and the Geneva in October, 1863, and that the original locators of said claims and their grantees have held undisputed possession thereof ever since, and by such possession and the working of said mines the possessory title was vested in defendant at the time

> it filed its application for said patent in the Land Office of the United States at Sacramento, January 6, 1871, unless the State of California had acquired title to Section 36 by grant from the United States. It also appears that on the land thus claimed by plaintiff a mining town called Amador City exists, of about four to five hundred people, which began in 1850, and reached the number mentioned in 1855, with many dwellings and some forty acres cultivated by the owners of the Keystone mining claim."

It will thus be seen that **both exceptions in the granting act existed prior to the time the school section came into existence** by the running of the public survey. (See *U. S. v. Morrison, 240 U. S., 192.)* The point of the decision is merely that the court enforced specific exceptions in the granting act. On page 175 of the opinion it is said:

> "It follows from the finding of the court and the undisputed facts of the case that the land in controversy being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school section grant.
>
> "It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the act of 1853."

United States v. Sweet, 245 U. S., 566, is the latest expression of this Court with regard to the policy of reserving mineral lands.

The case was a suit by the United States involving lands claimed by the State under the school land grant to

Utah (28 Stat. 107). The granting act was passed before the admission of Utah into the Union, and consequently, made to a state not yet in existence, could not have been a present grant. The opinion states that the land involved "is valuable for coal and has been known to be so since **before** Utah became a state." Thus the question for decision was whether a congressional act, which did not purport to operate *in praesenti*, conveyed lands known to be mineral at the time at which the grant should become effective; the act having been passed in 1894—**long after the policy of Congress with respect to the reservation and disposition of mineral lands upon the public domain had been fixed and formed into a special code collected in the Revised Statutes under the heading: "Mineral Lands and Mineral Resources."** The opinion points out that such legislative policy of excepting mineral lands first appeared in the statute dealing with grants to Nevada, and later in the act declaring that "no act passed at the first session of the 38th Congress granting lands to the States or corporations * * * shall be so construed as to embrace mineral lands." **Both these acts were passed long after the swamp act of 1849,** and consequently the comment of the court is not here applicable that:

> "Although applied in one instance to lands in Nevada, and in the other to grants made at a particular session of Congress, these declarations were but expressive of the will of Congress, that every grant of public lands, whether to the state or otherwise, shall be taken as reserving and excluding mineral lands, in the absence of express

> purpose to include them; and upon this theory both declarations were carried into the Revised Statutes as being general and permanent in their nature—the first in enlarged terms as Section 2318, and the other as Section 2346."

Cooper v. Roberts, 18 Howard, 173, is directly in point and controlling here.

There, as in the California case *(102 U. S., 167)*, the defendant was in possession of mineral lands, operating the property under agreement with the United States **before the official survey.** As in the California case, the mine operator received a patent from the United States (reserving, however, the rights of the State). And, like the California granting act, the statute in controversy granted to the State of Michigan the sixteenth section in every township. Thus the facts are identical and the statutes, so far, the same. But, unlike the California act, **which prohibited the establishment of section lines in mineral townships,** and which excepted from its terms lands possessed by settlers, the Michigan act (like the swamp land acts) contained no exception except the necessary one as to lands previously sold or otherwise disposed of. No patent or other evidence of legal title had issued from the United States to the State, but the State had issued patent to plaintiff.

Answering the contentions that mineral lands did not pass to the State by the granting act, the court found no distinction could be made between mineral and other

lands; that there being nothing in the statutes to justify such difference, the court could read no exception of mineral lands into the plain grant of each sixteenth section.

Likewise, in the Swamp Land Acts, there could have been no thought of a tacit exception of mineral lands in the unambiguous grant to the State of "all" lands of the certain and definite physical character there described; nor at that date had the present policy of the Government with regard to mineral lands been inaugurated.

Deffeback v. Hawke, 115 U. S., 392.

Nor is there anything in the opinion in the *Sweet* case that in any manner detracts from the authority of *Cooper v. Roberts*, which the Department, in its letter of instructions (46 L. D., 393) intimates was there overruled. What this court said is this:

> "Some observations in the opinion are not in accord with our present conclusion. These were relied upon in Ivanhoe Mining Company v. Keystone Mining Company, 102 U. S., 167, as our records show, and were in effect disapproved; **besides, when they were made, the public policy respecting mineral lands had not been expressed in general and permanent laws, such as were thereafter enacted and carried into the Revised Statutes;** the case is, therefore, neither controlling nor persuasive here."

But *Cooper v. Roberts* was decided in 1856, seven years after the passage of the swamp land grant of 1849, and six years after the passage of the grant of 1850.

At the date of the passage of the swamp land acts, therefore, "the public policy respecting mineral lands had not been expressed in general and permanent laws," and no reason can be adduced why, in the absence of an expression of Congress, an exception can now be read into an act granting in plain and unambiguous language all lands of a certain physical character.

Consequently, as was held by Solicitor General John W. Davis, as Acting Attorney General, in his decision of September 11, 1916 (Ferry Lake) advising the Secretary of the Interior with respect to the swamp land grant to Louisiana:

> "There was no exception of mineral land from the swamp land grant made to the State of Louisiana, and prior to that time, so far as Louisiana is concerned, the only reservation of minerals made by the Federal Government in its legislation affecting the public lands related to lands containing salt springs, lead mines and contiguous tracts. **The policy of reserving minerals generally was not established until after the swamp land grant was made to Louisiana.** The act of 1849 was a present grant, operative, if at all, from its date. As this land was not known to be valuable for minerals at the date of the grant, I do not see how the subsequent discovery of minerals can in any wise affect the right of the State to acquire title. Nor would the situation be materially changed even if the mineral character of the lands had been known in 1849, because there was no exception of mineral lands in the swamp grant made to Louisiana."

A copy of this decision is printed as an appendix to this brief.

In appellant's brief but little more than one page is devoted to the merits of the case, and his principal reliance is upon *United States v. Gratiot, 14 Peters, 526.* That case was a suit upon a bond given to secure the United States in respect of the obligations of a lease executed by the Government of certain lead mines in Illinois; the lessee having mined a considerable amount of lead, the royalties upon which he refused to account and pay for. It was not denied that the property from which the lead was mined was the property of the Government. The sole defense was that the President had no power to execute leases within the Northwestern Territory, because, it was argued, the Virginia cession gave to the United States power only to "dispose of" the ceded lands, and not to hold and lease them. The sole question was whether power to **"dispose of"** lands empowered Congress to authorize their leasing, which was answered in the affirmative.

In the course of the opinion, in discussing the act under which the lease was made (p. 538), the court used the language quoted and relied upon in appellant's brief, that:

> "It has been the policy of the Government at all times, in disposing of the public lands, to reserve the **mines** for the use of the United States."

But it will be noted that the language of the court relates to **mines,** not mineral lands; and that the acts discussed are all of a date prior to that of March 3, 1811 (see *Morton v. Nebraska, 21 Wall., 660),* under which **the**

reservation of salt springs and lead mines was specifically made for the benefit of the States.

It is clear, then, that the only legislation of this character prior to the swamp land grants related to salt springs and lead mines and lands contiguous thereto; that there was then no such legislative policy with respect generally to "mineral lands," and especially, in view of the act of 1811, it cannot seriously be argued that there existed at the date of the grants any defined policy to withhold either mineral lands or mines **from the States.**

The only other case cited in appellant's brief on the merits is *United States v. Sweet, 245 U. S., 563,* which, as we have already seen, dealt with a grant *in futuro,* passed long subsequent to the expression by Congress of its policy with respect to mineral lands, and which was held by this Court not to apply to lands known to be mineral at the date the grant became operative.

It is apparent that the appellant appreciates the weakness of his position in attempting to engraft upon the plain language of the grants an exception of all mineral lands and seeks to defeat this suit upon matters of procedure.

b.

If an exception of mineral lands could be read into the swamp land grant to Louisiana the Department would have no right to refuse its approval to the State to lands which were not in 1849 KNOWN to be mineral.

It is unnecessary further to review the jurisprudence to the effect that the swamp land act of March 2, 1849, was a present grant, nor is it necessary to go into a discussion of the decisions holding that reference in any granting statute to **mineral lands** means **lands known to be valuable for minerals.**

Deffeback v. Hawke, 115 U. S., 392.
Davis v. Weibbold, 139 U. S., 507.
Shaw v. Kellogg, 170 U. S., 312.

From the nature of the grant and its description of the lands conveyed to the State according to their physical condition, "by which the act itself identified them" *(234 U. S., 685, Burke v. S. P. Ry. Co.)*, it must be held that if mineral lands were excluded from the grant such excluded lands would be those only which were **known** to be mineral on March 2, 1849; whereas the order enjoined required the State to show **present** non-mineral character.

c.

Even if mineral lands were excepted from the grant, inquiry as to the mineral character of these lands could not be required.

As shown by the record (page 24), it was found by the Department, and is a fact, that the field notes of the survey of 1871, made by Deputy Surveyor J. P. Parsons and approved by the Surveyor-General, show all of the tracts here involved to be of the character of the lands granted by the United States to the State in 1849.

It further is a fact, as shown by the record (page 14), that in 1901 these lands were selected by the State and approval requested.

Hence, the record shows, and it was so found by the Commissioner, that the records of the Department have disclosed since 1871, the swampy character of these lands, and that the official return by the Deputy Surveyor in that year identified all of such lands as swamp. In other words, the Surveyor-General furnished the Department, in 1871, with evidence that the lands here involved were lands granted in 1849 by the United States to the State. On the approval of this survey the lands were completely and officially identified, and on that date, therefore, it became the duty of the Secretary of the Interior to approve these lands formally to the State as swamp and overflowed lands.

As pointed out by the Court of Appeals (Rec., pp. 34, 35), *287 Fed. 1001:*

> "The Commissioner of the General Land Office, in a decision under date of November 13, 1919, addressed to the Register and Receiver of the Land Office at Baton Rouge, Louisiana, not only found from the field notes of the survey of 1871 that the lands were swamp and overflowed, but instructed the Register and Receiver that: 'The survey of 1871, having been duly made, approved and accepted, and being the latest and controlling survey of said Township 18 North, Range 14 West, will be followed in the future, as it has heretofore been in the past, in the adjudication of claims to public lands shown therein.' It, therefore, appears that the Deparmtent has, at all

> times, recognized the finality of the approval of the survey of 1871 as settling the character of the lands as swamp and overflowed."

Now, while under the act of 1849 it was not incumbent on the State to select or to request the issuance of evidence of the fee simple title, because the Department was charged under the act with the duty of investigating the character of the land and the obligation made mandatory on the Secretary to approve the list of such lands as might be certified to by his deputies, it does stand out in the record that in 1901 the State formally requested the issuance of evidence of fee simple title. (Record, p. 14.)

Under these facts, there could be no possible warrant in law for the present requirement by the Secretary that the State show that the lands are not now of a mineral character.

In 1871 the regularly deputized representatives of the Secretary of the Interior furnished that office with the authentic evidence identifying such lands, which previously had lacked only that identification required for the issuance of evidence of fee simple title. Thirty years later the State, acting upon such evidence requested the issuance of the certificate. In 1871 the identification required by the statute was complete; certainly in 1901 the State had done everything possible in its power to do to complete its title. No possible reason can be adduced for requiring evidence as to the condition of the land fifty years after its identification and twenty years after the request for a certification.

There are so many adjudications directly controlling here that we deem it necessary to refer only to a few recent decisions of this Court:

Wyoming v. United States, 255 U. S., 457:

"The Land Department uniformly has ruled that the States acquire a vested right in all school sections in place which are not otherwise appropriated, **and not known to be mineral at the time identified by the survey, or at the date of the grant where the survey precedes it, regardless of when the matter becomes a subject of inquiry and decision, and that this right is not defeated or affected by a subsequent mineral discovery.** California v. Poley, 4 Copp's L. O., 18; Re Miner, 9 Land Decisions, 408; Rice v. California, 24 Land Dec., 14; United States v. Morrison, 240 U. S., 192-207, 60 L. Ed., 599-606, 36 Sup. Ct. Rep., 325; United States v. Sweet, 245 U. S., 563-572, 62 L. Ed., 473-480, 38 Sup. Ct. Rep., 193. And, as respects cash entries and entries under the preemption, homestead, desert land, and kindred laws, the Land Department always has ruled that if, when the claimant has done all that he is required to do to entitle him to receive the title, the land is not known to be mineral, he acquires a vested right, which no subsequent discovery of mineral will divest or disturb. Harnish v. Wallace, 13 L. Dec., 108; Rea v. Stephenson, 16 L. Dec., 37; Reid v. Lavelle, 26 Land Dec., 100-102; Aspen Consol. Mining Co. v. Williams, 27 Land Dec., 1-17; Diamond Coal & Coke Co. v. United States, 233 U. S., 236-240, 58 L. Ed., 936-939, 34 Sup. Ct. Rep., 507. And this rule has been applied by that Department, although not uniformly, to

selections made in lieu of relinquished lands in public reservations. Thus in Kern Oil Co. v. Clarke, 30 Land Dec., 550, where a lieu selection under the act of June 5, 1897, Chap. 2, 30 Stat. at L., 36, 9 Fed. Stat. Anno., 2d Ed., 587, was under consideration, the Secretary of the Interior said, p. 556: 'When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the Government holds the legal title in trust for him; (2) that the right to a patent, once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it becomes fixed; (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.' "

Payne v. New Mexico, 255 U. S., 367:

"In the brief for the officers it is frankly and rightly conceded to be well settled that 'a claimant to public land, who has done all that is required under the law to perfect his claim acquires rights against the Government, and that his right to a legal title is to be determined as of that time'; and

> also that this rule 'is based upon the theory that, by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his, and the Government holds it in trust for him.' See Lytle v. Arkansas, 9 How., 314, 333; Stark v. Starr, 6 Wall., 402, 417, 418; Ard v. Brandon, 156 U. S., 537, 543; Payne v. Cent. Pac. Ry. Co., 255 U. S., 228. But it is said that as the selection is 'subject to the approval of the Secretary of the Interior,' no right can become vested, nor equitable title be acquired thereunder unless and until his approval is had; and, therefore, that the rule just stated is not applicable here. To this we cannot assent."

And in the more recent case of ***Santa Fe Pacific Ry. Co. v. Fall, 259 U. S., 197:***

> **"It is established** in the parallel cases of Payne v. Central Pacific Ry. Co., 255 U. S., 228; Payne v. New Mexico, 255 U. S., 367, and Wyoming v. United States, 255 U. S., 489, 496, **that the validity of the selection must be determined according to the conditions existing at the time when it was made."**

It is, therefore, respectfully submitted that the decree of the Court of Appeals is correct, and should be affirmed.

Respectfully submitted,

PERCY SAINT,
Attorney General of Louisiana.
F. W. CLEMENTS,
S. L. HEROLD,
Attorneys for Appellee.

APPENDIX.

SWW-JEL

September 11, 1916.

The Secretary of the Interior:

Sir:

With your letter of March 22, 1916, you submitted to this Department the papers relating to the area known as Ferry Lake, in Township 20 North, Range 16 West, in the State of Louisiana, consisting of some 670 acres of land lying between the mean high water mark and the meander line established by the public land survey in 1839, and nearly 10,000 acres covered by the water of the lake itself.

This matter was first called to the attention of your Department in 1908 by the application of Thomas Singleton, Jr., and others for the survey of the resurveyed area of public land in the township named. Later, in the year 1910, John B. King and others filed amended applications under the mining laws of the United States, asserting an interest in portions of the area involved alleged to be valuable for oil and gas. From that time until the papers were submitted here last March, the matter has been pending before your Department in various forms. Investigations have been made by surveyors, geologists and ecologists of your Department. Several hearings have been had before the Commissioner of the General Land Office and the Secretary of the Interior, culminating in a lengthy communication to you from the Commissioner under date of July 9, 1915, in which the latter finds that the entire area

—that under the waters of the lake as well as the land between the high water mark and the old meander line—is the property of the United States and recommends its survey as such.

While you approve the facts found by the Commissioner, you conclude that there is no necessity for a survey at the present time, owing to the fact that all the vacant public lands in the township have been withdrawn from location, sale, etc., by the Departmental order of December 15, 1908, because containing valuable oil and gas deposits, and that the lands are now included in executive order of withdrawal dated July 2, 1910, as to the 670 acres of land lying between the old meander line and the mean high water mark, you state that wells have been drilled thereon in trespass and in defiance of the withdrawal orders and you accordingly recommend that appropriate proceedings be instituted to assert the right and claim of the Government to the lands, and the minerals therein, and also to recover for the trespass already committed.

As to the area below the mean high water mark of the lake, that is, the portion actually covered by water, upon which it seems more than sixty wells have been drilled under leases from the State or the Levee Board, which are producing large quantities of oil, you make no definite recommendation, further than to "submit the entire record to you (the Attorney General) for the institution of legal proceedings to assert and protect the interests of the United States in and to the land and minerals, if in your (the At-

torney General's) judgment the law and facts warrant such proceedings."

The papers in this case are voluminous, consisting of affidavits, briefs, reports and documents, some of which date back to the early days of the century. From such examination as this Department has been able to make of these papers, and from the facts stated by the Commissioner of the General Land Office in his lengthy report to you, and from the briefs of opposing counsel, as well as admissions made by them at a hearing which was held in this Department, I can safely say there is little, if any, real controversy over the material facts, which may be substantially stated as follows:

What is known as Ferry Lake, or Caddo Lake, as it is sometimes called, covers an area of some twenty by fifteen miles, lying partly in Louisiana and partly in Texas. In this area there are two bayous known as Cypress Bayou and James Bayou, the latter emptying into the former at a point now covered by the waters of the lake and the water carried by both bayous later found its way through Cypress Bayou into the Red River. A large part, if not all, of this area was low land, and at some time prior to the last part of the eighteenth century, *i. e.*, about 1780, was covered by a growth of forest trees. However, several hundred years ago there formed at the mouth of the Red River an accumulation of logs and debris which practically closed up the river and greatly impeded its flow. This accumulation was locally known as a raft, and while it existed it

continued to grow at its upper end by reason of the lodgment against it of other trees and matter flowing down the river, while the lower end, on the contrary, after a time began to decay and fall away so that the progress of the raft was up the current of the stream.

Some time about the year 1780, the particular date being immaterial, the raft had progressed up the stream to the point opposite Cypress Bayou. This impeded, if it did not stop, the flow of the water from the bayou into the river, as a result of which sediment was deposited in the bayou's mouth, and the waters were backed up until they extended beyond the banks and over the entire surrounding low area known as Ferry Lake. It should be said here that by reason of this deposit at the lower end of the bayou, its original course below the lake has been entirely obliterated and it no longer constitutes an outlet of Ferry Lake, which at some time formed another outlet higher up, known as Twelve-mile Bayou.

The raft continued in the river for many years, but has now been entirely removed. Indeed the removal took place a number of years ago, but upon the removal of the raft Ferry Lake did not disappear. In this connection it should be said that a few years ago the Federal Government constructed a concrete dam across the lower end of the lake so as to maintain a certain stage of water, and while the construction of the dam has maintained a higher level of water in the lake, it is not pretended that the lake would now be dry if the dam were removed, or if it had not been

constructed. The most that is contended in this regard is that when the hard soil in the bed of Twelve-mile Bayou is sufficently eaten away, which the applicants for survey predict will be within some 25 years, then the fall from Ferry Lake to Red River will be sufficent for Twelve-mile Bayou to drain the lake.

For many years, beginning possibly as early as 1840, there was considerable navigation across Ferry Lake from a point in Texas known as Jefferson. This navigation was through Ferry Lake and other lakes to the Red River, and thence down that river to the Mississippi and to various points along the latter. This commerce was at times by no means inconsiderable, but it has now diminished, principally on account of the construction of railways in that part of the country. The channel of Cypress Bayou can be distinctly traced even now through the bed of the lake. The trees that formerly grew on the land adjoining the bayou have been killed. Many of the stumps are still in existence, some of them projecting above the water, but many of them have entirely disappeared. The channel of the bayou is now susceptible of navigation, and has been so from a date prior to the establishment of the Government of the United States. That portion of the lake outside of the channel of the bayou varies in depth, some of it being nine or ten feet deep. Plats filed on behalf of the State of Louisiana show that a depth of three feet obtains over practically the entire area of the lake, a depth of five feet over a somewhat smaller area, and a depth of seven feet over a still smaller portion.

The meander line of the lake was surveyed in 1839, when the public lands surveys were extended over this section of the country, and from the examinations and surveys recently made by the General Land Office, that line did not accord with what was then the mean high-water mark of the lake. Notably on the north and near James Bayou a considerable area of what was land at that time, was omitted from the survey, and elsewhere there are slight variations between the survey of 1839 and the recent survey made by the General Land Office. However, on the whole, the recent careful investigations made by the agents of your Department show that with the exception of the land omitted on the north end of the lake the old survey of 1839 was remarkably accurate and practically followed, in the main, the mean high-water mark.

It is possible that the waters of Red River, in times of flood, now find their way into Ferry Lake, and it may be that some of them did so at the time of the formation of the lake, or soon afterwards, but Cypress Bayou has a water shed of some 2800 square miles, and its own waters are sufficient for the maintenance of the lake.

About the year 1908 the lands in this vicinity became known to be valuable for oil and gas. Exploration resulted in the discovery of wells of large production. The State of Louisiana, claiming to own the lands under the waters of the lake by virtue of its sovereignty, granted them to the Caddo Levee District, which, in turn, leased them to the Gulf Refining Company, the latter paying a royalty of one-

eighth of the mineral produced. Under this lease large sums of money have been paid into the treasury of the Levee District. The claim of the State of Louisiana is confined to the area actually covered by the waters of the lake, and it lays no claim to the 670 acres of land lying between the high-water mark and the old meander line.

It is claimed on behalf of the State of Louisiana that Ferry Lake as a whole is a navigable body of water; that it was such in 1812, when Louisiana was admitted into the Union on an equality with the other States, and that she thereby became entitled to the bed of the lake by virtue of her sovereignty; but if this contention should not prevail—that is, if the lake should be held to be non-navigable—in that event the State claims to be entitled to the lands lying under the water by virtue of the Swamp Land Grant made under the Act of March 2, 1849 (9 Stat., 352).

The applicants for survey, of course, base their claim under the mining laws of the United States, and they accordingly assert that the land is public land and urge that it be surveyed as such, to the end that they may be afforded an opportunity of perfecting their claims.

It is well settled that lands lying under navigable waters in this country belong to the States by virtue of their sovereignty. So numerous and well-known are the decisions on this point it is not necessary to mention them. The only question presented in this rgard is one of fact—whether the lake is navigable. That it was navigable at one time is

beyond dispute, and that portions are even now navigable is also true. This applies, at least, to what is known as the channels of Cypress and James Bayous. I do not think we are concerned with the cause from which the lake resulted. It may have been unusual, even extraordinary, but the admitted cause in this case was unquestionably not artificial.

It may be that about the time of the admission of Louisiana into the Union in 1812, the waters of the lake outside of the channel of the bayous were filled with stumps and bodies of dying or dead trees, which would have interfered with practicable navigation, and possibly have prevented it entirely. That, however, I regard as immaterial, because I have been referred to no decision to support the contention that there can be such a thing as the severance of the navigable from the non-navigable portion of a body of water. Certainly until now the United States has never questioned the navigability of this lake, nor has it done anything to show that it regarded the channel of Cypress Bayou as severable from the other waters of the lake. On the contrary, the entire area has been regarded as a lake, or body of water susceptible of navigation. When the public lands surveys were made nearly 75 years ago they represented the lake practically as it now is, with the exception heretofore noted, where on the north some considerable portion of high land was erroneously represented as water.

Until the land lying under the water was discovered to be valuable for oil and gas there was not even a sugges-

tion that Ferry Lake was not a permanent body of water susceptible of navigation, nor was any request made of the Government to extend its surveys across it, except in so far as certain comparatively small areas of land were concerned, which had been erroneously omitted from the original survey of 1839. This body of water as a whole furnished a channel for commerce and had done so for a number of years. On the face of it, therefore, the State was clearly justified in regarding the lake as a navigable body of water, and the Federal Government, by the construction of the dam across the lower end of the lake, has encouraged the State in this belief.

The channel of the bayou itself is unquestionably navigable, and the moment an attempt is made to regard the channel of the bayou as an independent navigable stream, entirely severable from the outlying water of the lake, another question is presented: If the waters may be properly severable, are not the submerged lands lying beyond the banks of the bayou overflowed lands and, therefore, subject to the grant made to the State of Louisiana in 1849 of all the swamp and overflowed lands "which may be or are found unfit for cultivation?"

It is beyond dispute that within the present boundaries of the lake and outside of the channels of Cypress Bayou and the other bayous flowing into it there was at one time, probably as late as 1780, a dense growth of forest timber, which proves conclusively that this area was at one time not covered by water. This area is styled by the

applicants for the survey as "submerged forest" or "submerged land," but it might as well be called "overflowed land." To my mind there is no difference.

It is contended by the applicants for survey that the water can be drained from this land. Indeed, they assert that if let alone the lake will drain itself in perhaps another 25 years. If that be so (and it must conceded that the land can be drained by artificial means, whatever may occur if it be let alone), the case would seem to be one peculiarly within the swamp land grant, which was made "to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein." It is not improbable that this very situation, and others like it, were in the mind of Congress when the swamp land grant was made. The case seems to fall within the very letter of the law, and I can conceive of nothing that would justify us in saying that it was not within its spirit.

I see little force in the contention that the State can not consistently now assert title under the swamp land grant. Its failure to do so earlier is accounted for by the fact that the lake was regarded as a navigable body of water. And it is idle to say that the State, having asserted a claim by virtue of its sovereignty, is now estopped to assert any other claim. If the officers of the State, misconceiving her rights, assert one claim, their action in so doing in no sense estops the State from subsequently asserting any rights she may have under the law.

As I see it, Ferry Lake is either a navigable body of water as a whole, or the area outside of the beds of the bayous must be regarded as submerged, or overflowed lands, which being susceptible of drainage, the State of Louisiana is entitled to acquire under the swamp land grant. I do not believe that in the State of Louisiana, where the swamp land grant obtains, the Government can properly close its surveys on a shallow, non-navigable body of water and thus prevent the State from acquiring title under the swamp and overflowed land grant. This is clearly indicated by the Supreme Court in its decision in *Mitchell v. Smale (140 U. S., 406)*, where, considering a somewhat similar question, the Court said:

> "Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein, this cannot be done. (Pp. 413, 414.)

This brings me to a consideration of the last contention made by the applicants for survey, and in which they are sustained by the Commissioner of the General Land Office, namely, that the land in question is mineral, and, therefore, did not pass to the State under the swamp land grant. In this connection it is urged that such title as the State

acquired under that grant was merely inchoate, and that if prior to the perfection of that title by the performance of all the acts necessary to pass title, the land is discovered to be valuable for mineral, it is excepted from the grant. I do not understand this to be the law. **There was no exception of mineral land from the swamp land grant made to the State of Louisiana and prior to that time, so far as Louisiana is concerned, the only reservation of minerals made by the Federal Government in any of its legislation affecting the public lands related to lands containing salt springs, lead mines and contiguous tracts. The policy of reserving minerals generally was not established until after the swamp land grant was made to Louisiana. The Act of 1849 was a present grant, operative, if at all, from its date, and as this land was not known to be valuable for mineral at the date of the grant I do not see how the subsequent discovery of mineral can in any way affect the right of the State to acquire title. Nor would the situation be materially changed, even if the mineral character of the land had been known in 1849, because there was no exception of mineral in the swamp grant made to Louisiana.**

This view is supported by the Supreme Court's decision in *Cooper v. Roberts (18 How., 173)*, which involved a question essentially similar. In that case the State's title under the school grant was contested upon the ground that the land was valuable for its deposit of copper and it was contended that by the act of March 1, 1847 (9 Stat., 146), all the reported mining lands in that district were removed

from the operation of the general laws. The land there involved had been reported as mining land and, indeed, it has been leased for mining purposes by the Secretary of War, large expenditures having been made under the lease.

The school grant involved in that case was like the swamp grant, one *in praesenti*, though unlike the latter, the former attaches to no particular tract of land until survey is made, notwithstanding which the Supreme Court held that as there had been no reservation of gold, silver or copper mines until after Michigan had been admitted into the Union, the act of 1847, which made such reservation, did not affect the State's right.

The decision in *Cooper v. Roberts* sheds further light upon this question in that it refers to subsequent legislation which abrogated those clauses of the act of 1847 which distinguished the mineral from other public lands and placed them alike under the ordinary system for the disposal of the public domain. (See the Act of September 26, 1850, 9 Stat., 472.)

In view of the entire situation I feel that no action should be taken to enforce or assert any claim by the Government to that portion of the area involved which is covered by the waters of the lake, because if the State's title by virtue of its sovereignty should fail for any reason I see no way of successfully resisting her claim under the swamp land grant.

However, in so far as concerns the land lying between the old meander line and the waters of the lake, I entirely agree with you that it constitutes unsurveyed public land of the United States, and that appropriate proceedings should be taken to enforce the Government's claims. I am so advising the United States Attorney at Shreveport by letter of even date and am sending him copies of the Special Agent's reports received with your letter of July 28 last, showing the trespasses which have been committed thereon.

In this connection permit me to say that I think it altogether advisable, if not in fact imperative, that the public land surveys be extended over the land before the suits which are to be brought are actually filed. While your Department has approved the finding of the Commissioner of the General Land Office that this land was erroneously omitted from the survey I still feel that the survey should be actually corrected before legal proceedings are instituted. The Courts have no power to make or correct surveys, and until the survey is corrected the Government might experience some difficulty in establishing its claim to the land. In this connection I invite your attention to the decisions of the Supreme Court of *Cragin v. Powell, 128 U. S., 691; Knight v. United States Land Association, 142 U. S., 161,* and *Kirwan v. Murphy, 189 U. S., 35.*

I have accordingly advised the United States Attorney that he should, as early as possible, prepare his pleadings, but that he should delay the filing of them pending the

execution of the survey, or at least until after one has been ordered and undertaken.

I am returning, under separate cover, all of the papers, maps, etc., received with your letter of March 22.

Very respectfully,

(Signed) JNO. W. DAVIS,
Acting Attorney General.